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International Law Situations

SITUATION II

NEUTRALITY PROBLEMS: DISTRESS, SUBMARINES, AND QUALIFIED NEUTRALITY

States U and W are at war. The United States is neutral and the President has invoked the Joint Resolution of May 1, 1937, including section 8. State W is a Latin-American Republic.

(a) A commercial submarine of State U, pursued by a destroyer of State W and damaged by the destroyer's gunfire, arrives off an American port and seeks entry, claiming that it is unarmed and in distress.

(b) An armed merchant vessel of State W, sailing from an American port, is torpedoed and sunk $2\frac{1}{2}$ miles off the American coast by a submarine of State U which did not come to the surface before attacking. Three American citizens on board are drowned. In response to the American Government's protest over the sinking, State U replies that the United States cannot claim the protection of the customary laws because of its unneutral conduct.

(c) States A, B, C, D, and E apply economic sanctions against State W. The latter asks the United States to apply the joint resolution of May 1, 1937, to these States on the basis of section 1b of the joint resolution.

What should be the legal position of the United States in each of the above cases?

SOLUTION

(a) The submarine should be admitted. Whether, after entry it should be interned or allowed to make repairs and depart depends upon whether all submarines are to be classed as warships or whether the American Government continues to recognize that some submarines can possess a genuinely commercial character.

(b) The action of the submarine of State U is illegal, constitutes a violation of American neutrality, and should be protested by the United States. Despite its unneutral conduct in regard to Latin America, United States is still a neutral and entitled to neutral rights, though its position is somewhat weakened by the application of section 8 of the law of 1937.

(c) The application of the provisions of the law of 1937 to States applying economic sanctions is a matter of executive discretion and not one of legal obligation.

VESSELS IN DISTRESS

Both domestic and international law make exceptions for force majeure. Whatever the rules or prohibitions may be, ships in distress are given asylum and are exempted from the usual requirements as to entry or from any special bans or prohibitions. As was said in the Harvard Draft Code on Territorial Waters, American Journal of International Law, Supplement 1929, pp. 299-300:

An exemption clearly ought to be made where the vessel enters territorial waters in distress or because of force majeure or where a vessel having entered the marginal sea for purposes of innocent passage, the passage is there broken

because of distress or force majeure. In such cases, the vessel should be immune from all penalties which might otherwise have been incurred by reason of its presence in territorial waters. Such penalties would include all penal forfeitures, confiscations, and criminal liabilities which the littoral state might impose on the vessel, its cargo, or the persons on board.

Nevertheless, a vessel entering territorial waters in distress may not wholly ignore the local jurisdiction. For example, if the ship has required salvage assistance, the salvor may sue for his compensation. Also, if the vessel or those on board commit an offense against the local law subsequent to the entry in distress, the littoral state's power to punish is undiminished.

It is customary to throw upon the vessel the burden of proving actual distress or force majeure. It seems reasonable also to assert that if a vessel is hovering just outside the marginal sea for the purpose of smuggling, the plea of distress will not be recognized if she is subsequently forced within the three-miles limit by stress of weather, shortage of water or provisions, or the like.

"Distress" may include injury to hull or machinery or shortage of provisions or fuel. But in the latter cases it must be shown that the shortage was not due to improvidence in supplying the vessel before her voyage began. "Force majeure" may include the action of pirates or mutineers. In such cases the pirates or mutineers should be subject to prosecution since in this instance it is the ship and cargo only and not the persons in charge whose entry into territorial waters is due to compulsion.

In regard to warships it is clear that in time of war as well as in peace such vessels have a right of entry if in distress. During the war of 1914-18, the Netherlands, which excluded all belligerent warships, made an exception in favor of vessels in want or in danger from weather or sea conditions. Insofar as permission *to enter* is concerned, international law does not distinguish between the

causes of the distress. Vessels damaged by enemy gunfire or pursued by enemy craft are granted asylum in a fashion no different from warships driven in by stress of weather. Once admitted in distress, a belligerent warship is subject to varying treatment depending upon the causes of the distress. What should be done *after* admission is therefore a separate problem from that of the original entry. Force majeure gives *a right of entry only* but no necessary right to repair the damage, to replenish supplies, to depart freely, or to be immune from internment. The distress must be genuine:

“Where the party justifies the act upon the plea of distress it must not be a distress which he has created himself . . .” (Hyde, International Law, Vol. I, p. 400, note.)

The subject of asylum in neutral ports was carefully considered in Naval War College Situations, 1935, pp. 42–53, and is also treated at length in the Harvard Draft Code “Rights and Duties of Neutral States in Naval and Aerial War,” American Journal of International Law, Supplement, July 1939, pp. 425–432, and pp. 462–477.

REPAIR OF DAMAGE CAUSED BY ENEMY FIRE

Though for a long time international law did not distinguish in matters of repair between damage caused by enemy fire and injury due to a different origin and, in the words of article 17 of Hague Convention XIII of 1907, merely said that “belligerent warships may only carry out such repairs as are absolutely necessary to render them seaworthy and may not add in any manner whatsoever to their fighting force,” in later years a clear

distinction has been made between the sources of damage. In the Havana Convention on Maritime Neutrality of 1928 (Hudson, "International Legislation," Vol. IV, p. 2402) article 9 reads:

Damages which are found to be produced by the enemy's fire shall in no case be repaired.

One also finds in the Scandinavian rules regarding neutrality (American Journal of International Law, October 1938, Official Documents, p. 144) the following article from the Danish regulations. Similar statements exist in the rules as put forth by Finland, Iceland, Norway, and Sweden:

In Danish ports or anchorages, belligerent warships may repair damages only to the extent indispensable to the safety of their navigation, and they may not increase in any manner their military force. Damaged ships may procure no aid on Danish territory for the repairing of damages manifestly caused by acts of war of the adversary. The competent Danish authorities shall determine the nature of the repairs to be made.

In the Harvard Draft Code on Neutrality, *op. cit.*, article 34 states:

A neutral State which admits a belligerent warship in distress shall permit such warship to remain only for the time necessary for remedying the condition of distress under which it entered; but a condition of distress which is the result of enemy action may not be remedied and if the vessel is unable to leave, it shall be interned.

The proclamation of the President of the United States, September 5, 1939, expressly forbade repairs of damage inflicted by the enemy:

No ship of war of a belligerent shall be permitted, while in any port, harbor, roadstead, or waters subject to the jurisdiction of the United States, to make repairs beyond those that are essential to render the vessel seaworthy and which

in no degree constitute an increase in her military strength. Repairs shall be made without delay. Damages which are found to have been produced by the enemy's fire shall in no case be repaired.

(4 Federal Register, p. 3809.)

NEUTRAL REGULATIONS IN REGARD TO SUBMARINES

Though customarily neutral powers have admitted belligerent warships into their ports, subject of course to the regulations concerning length of stay, repairs, and supplies, the naval vessels of States at war have no absolute right to enter neutral harbors. Neutral States may, if they wish, do as The Netherlands did in the last war and exclude all belligerent warcraft entirely. The neutral is under no duty to forbid entry into its territorial waters or roadsteads, but it has the right to apply such a ban if it chooses.

The practice of states indicates that warships are usually admitted to neutral waters under conditions fixed by the neutral state, but the evidence does not indicate that admission is allowed as a matter of legal duty, though there were many treaties in the 18th century which provided that public armed vessels might enjoy the hospitality of neutral ports. Total exclusion, however, was the rule applied in certain instances which were not cases of reprisal . . . (Harvard Draft Code, *op. cit.*, page 426.)

There is no obligation upon neutral states to admit warships belonging to belligerent states, but it is not in general refused. (Commission of Jurists, General Report, 1923, British Parliamentary Papers, Cmd. 2201, p. 38.)

Special regulations have been issued by many powers in regard to submarines. This type of ship has been singled out for individual attention due to the fact that the operations of submarine craft

are more difficult to control than those of surface vessels and are more likely to involve a neutral power in difficult and embarrassing complications. In the World War, for example, Spain issued a decree which forbade all submarine vessels of any kind whatsoever belonging to belligerent powers to navigate in Spanish waters. Norway and Sweden also issued orders strictly limiting the right of submarines to enter their jurisdiction. After the war other States such as Belgium, Venezuela, the United States, and Yugoslavia drafted regulations dealing with submarines, and the Harvard Draft Code, *op. cit.*, pages 432-435, contains a special article declaring that:

A neutral state may exclude belligerent submarine vessels from its territory, or admit such vessels on condition that they conform to such regulations as may be prescribed.

PROVISIONS OF THE AMERICAN NEUTRALITY ACT OF 1939

Section 11. Whenever, during any war in which the United States is neutral, the President shall find that special restrictions placed on the use of the ports and territorial waters of the United States by the submarines or armed merchant vessels of a foreign state will serve to maintain peace between the United States and foreign states, or to protect the commercial interests of the United States and its citizens, or to promote the security of the United States, and shall make proclamation thereof, it shall thereafter be unlawful for any such submarine or armed merchant vessel to enter a port or the territorial waters of the United States or to depart therefrom, except under such conditions and subject to such limitations as the President may prescribe. Whenever, in his judgment, the conditions which have caused him to issue his proclamation have ceased to exist, he shall revoke his proclamation and the provision of this section shall thereupon cease to apply, except as to offenses committed prior to such revocation.

**PROCLAMATION OF THE PRESIDENT,
NOVEMBER 4, 1939**

WHEREAS section 11 of the Joint Resolution approved November 4, 1939, provides:

“Whenever, during any war in which the United States is neutral, the President shall find that special restrictions placed on the use of the ports and territorial waters of the United States by the submarines or armed merchant vessels of a foreign state, will serve to maintain peace between the United States and foreign states, or to protect the commercial interests of the United States and its citizens, or to promote the security of the United States, and shall make proclamation thereof, it shall thereafter be unlawful for any such submarine or armed merchant vessel to enter a port or the territorial waters of the United States or to depart therefrom, except under such conditions and subject to such limitations as the President may prescribe. Whenever, in his judgment, the conditions which have caused him to issue his proclamation have ceased to exist, he shall revoke his proclamation and the provisions of this section shall thereupon cease to apply, except as to offenses committed prior to such revocation.”

WHEREAS there exists a state of war between Germany and France; Poland; and the United Kingdom, India, Australia, Canada, New Zealand, and the Union of South Africa:

WHEREAS the United States of America is neutral in such war;

NOW, THEREFORE, I, FRANKLIN D. ROOSEVELT, President of the United States of America, acting under and by virtue of the authority vested in me by the foregoing provision of section 11 of the Joint Resolution approved November 4, 1939, do by this proclamation find that special restrictions placed on the use of the ports and territorial waters of the United States, exclusive of the Canal Zone, by the submarines of a foreign belligerent state, both commercial submarines and submarines which are ships of war, will serve to maintain peace between the United States and foreign states, to protect the commercial interests of the United States and its citizens, and to promote the security of the United States;

AND I do further declare and proclaim that it shall hereafter be unlawful for any submarine of France; Germany; Poland; or the United Kingdom, India, Australia, Canada, New Zealand, or the Union of South Africa, to enter ports or territorial waters of the United States, exclusive of the Canal Zone, except submarines of the said belligerent states which are forced into such ports or territorial waters of the United States by *force majeure*; and in such cases of *force majeure*, only when such submarines enter ports or territorial waters of the United States while running on the surface with conning tower and superstructure above water and flying the flags of the foreign belligerent states of which they are vessels. Such submarines may depart from ports or territorial waters of the United States only while running on the surface with conning tower and superstructure above water and flying the flags of the foreign belligerent states of which they are vessels.

AND I hereby do enjoin upon all officers of the United States, charged with the execution of the laws thereof, the utmost diligence in preventing violations of the said joint resolution, and this my proclamation issued thereunder, and in bringing to trial and punishment any offenders against the same.

AND I do hereby revoke my Proclamation No. 2371 issued by me on October 18, 1939, in regard to the use of ports or territorial waters of the United States by submarines of foreign belligerent states.

This proclamation shall continue in full force and effect unless and until modified, revoked or otherwise terminated, pursuant to law.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

DONE at the city of Washington this fourth day of November, in the year of our Lord nineteen hundred and
 [SEAL] thirty-nine and of the Independence of the United
 United States of America the one hundred and
 sixty-fourth, at 12.04 p. m.

FRANKLIN D. ROOSEVELT

By the President:

CORDELL HULL

Secretary of State.

(4 Fed. Reg., p. 4494.)

COMMERCIAL SUBMARINES

During the World War of 1914-18 there was a difference of opinion between the American and British Governments on the subject of commercial submarines. It was the American contention that a submarine could be a bona fide merchant vessel, a view which it upheld in regard to the German submarine *Deutschland* which arrived in Baltimore July 9, 1916, with a cargo of dyestuffs. Great Britain contended that the *Deutschland* should be treated as a warship, claiming that it was not likely that submarines could be employed in anything but a hostile capacity. The United States Government did not alter its stand, however, and because of the reference to commercial submarines in the President's proclamation of November 4, 1939, it is apparent that this country still considers it perfectly possible for a submarine to operate as a genuinely commercial ship. The American and British exchange of 1916 is thoroughly considered in Naval War College, International Law Situations, 1931, pp. 73-78.

APPLICATION TO THE PRESENT SITUATION

The submarine of State U should be granted entry into the American port. The rule as to asylum governs this case and the distress seems genuine. If the American Government is convinced that the submarine is really unarmed and is a commercial craft, and if, as seems likely, it adheres to the view expressed in the replies to Great Britain in 1916, then the vessel should be treated like any surface merchant craft. It can remain indefinitely in American waters and may obtain full

repairs and supplies. If the submarine, however, is looked upon as a warship, then it could remain in port but 24 hours. Because it arrived in distress, it is exempt from the prohibition against entry but it is not free to stay to make repairs of damage caused by enemy gunfire. Classed as a war vessel, the submarine must either depart within the stipulated period or else be interned.

AMERICAN NEUTRALITY AND LATIN AMERICA

In both of the American so-called neutrality laws of 1937 and 1939 there were provisions relating to Latin America and exempting those republics from the application of the statutes, provided such republics were not cooperating with any non-American states in any war. In the 1937 law section 4 dealt with the American Republics, and virtually the same stipulations were contained in section 9 of the 1939 enactment. This section reads as follows:

This joint resolution (except section 12) shall not apply to any American republic engaged in war against a non-American state or states, provided the American republic is not cooperating with a non-American state or states in such war.

Maintenance of the Monroe Doctrine is what Congress obviously had in mind in framing this part of the legislation. Application of this section in any war between a Latin-American republic and a non-American power would clearly involve the United States in unneutral conduct. This country would not be impartial but would be applying restrictions on loans, shipment of goods, travel on belligerent vessels, etc., against one of the parties (the non-American state) and not against the

Latin-American belligerent. In general there was very little debate in Congress, however, on this part of the law. One of the few Congressmen to comment on this section and to point out some of the dangers was Representative McReynolds who declared:

“With this mandatory provision, suppose a foreign country should attack Mexico or Canada or should attack any of the South American countries. You could not ship any of those countries arms. Your President would have no discretion. The bill makes no exception. Then where is your Monroe Doctrine?”

(Congressional Record, Vol. 79, p. 14370.)

Also at the time of the discussion about the 1937 law, Assistant Secretary of State Moore declared in the Senate committee hearings:

“The threat of an attack would be known before there was an actual one. The nation that might make it is a good many thousand miles away. It would be known in time for Congress to act and to remove the restrictions so far as the country to the south of us was in danger. * * * So, practically, it does not seem to be desirable, certainly not necessary, to put any such exception in the law.”

(Hearings, No. 3, p. 43.)

Not much else was said, however, in either branch of Congress, and a section calling for unneutrality thus slipped into a so-called neutrality statute, with a minimum of discussion.

ARMED MERCHANT VESSELS

The problem of armed merchantmen has been discussed many times in Naval War College situations, notably in 1927, and has been thoroughly analyzed by Borchard and Lage in “Neutrality for the United States,” part II, Chapter II. During

the World War of 1914-17 the American Government insisted upon the right of American citizens to travel upon belligerent armed merchant ships, and permitted such vessels to enter our ports. In its controversy with Germany over submarine warfare, the United States also insisted that belligerent merchant ships, armed or unarmed, were entitled to warning before being sunk. Though Secretary of State Lansing in 1916 attempted to change the American stand, the British contention that their ships were armed for "defensive" purposes was accepted by the United States. It is true that American citizens had a right to take passage on belligerent armed vessels but they did so at their own risk, and the effort of the United States to obtain a promise from Germany to have its submarines come to the surface and give warning, at the same time that it was condoning the British practice of arming for defense, was neither very successful nor very logical. During the war of 1939-40 the same problem has not recurred. Under the neutrality laws, American citizens are forbidden to travel on belligerent ships and the arming of American merchant vessels has been prohibited. The President, further, under section 11 has the authority to forbid the entry of foreign armed merchantmen. By domestic statute, therefore, the United States is better equipped than before to meet the armed merchantmen problem, but the fact remains that under *international* law American citizens may still travel on belligerent armed merchant ships.

QUALIFIED NEUTRALITY

Nations which assume an equivocal attitude toward a war and which are not completely neutral in all respects, may be said to be in a state of qualified neutrality. Previous examples of this dubious status may be found in Naval War College, International Law Situations, 1917, and the action of Brazil which revoked its neutrality law on June 4, 1917, without making a declaration of war is to be noted especially. Qualified neutrality has put in its appearance in the European war of 1939-40. Italy officially adopted a position of "nonbelligerency" instead of neutrality (See Italian note to Great Britain, March 4, 1940, New York Times, March 5, 1940), and in January 1940 the Turkish Foreign Minister declared, "We are not neutral; we are simply not in the war" (New York Times January 27, 1940). In the past, neutrality has derived its vitality from a feeling of genuine indifference on the part of third states to the outcome of the conflict. Contrary to the assertions made by some collective-security enthusiasts to the effect that neutrality is the negation of community feeling, neutrality is possible only when there is sufficient community of interest between the belligerents and between the belligerents and the neutrals to cause the latter not to care too greatly which side wins. Neutrality therefore depends upon the existence of enough community to make the outcome of a war not a matter of alarming concern to the way of life of nonparticipating States. Where the community schism runs deep, neutrality becomes more and more difficult to maintain.

Failure of a neutral to discharge its obligations in all respects, does not necessarily mean that it is deprived of all neutral rights or has assumed a position of complete partiality. Any sort of un-neutral conduct does open the way for reprisals by the injured belligerent party. In the present case, the United States is not completely neutral between States U and W. Armed merchant vessels of the latter are entitled to entry into American ports and American citizens may travel on the ships of State W. State U has a legitimate basis for grievance against the United States. Failure of the United States to be impartial in respect to its neutrality law, however, would not seem to deprive it of the protection of all the customary laws of neutrality. American citizens had a right to be on the vessel of State W, and the sinking, which was an act of war committed within the territorial waters of the United States, was flagrantly illegal. Had the sinking occurred on the high seas, the destruction without warning of an armed vessel would not be so serious (see discussion above on armed merchant vessels), but the United States cannot permit such an act within its territorial limits and should protest strongly to State U. Both the diplomatic and legal positions of the United States, however, are admittedly weakened by the adoption of the special partiality stand, and the situation well illustrates some of the complexities which can arise when a nation abandons strict neutrality without embarking upon the course of belligerency.

APPLICATION TO OTHER STATES "INVOLVED" IN WAR

Section 1b of the 1937 Neutrality law states that "the President shall, from time to time, by proclamation extend such embargo upon the export of arms, ammunitions, or implements of war to other states as and when they may become involved in such war" and the concluding part of section 1a of the Neutrality Act of 1939 also specifies that the President "shall from time to time by proclamation name other states as and when they may become involved in the war." Interpretation of the word "involve" is the central problem here. Foreign nations which engage in the war and become belligerents, apparently would be "involved" and probably would have to be named by the President in his proclamation, though there is room for argument on this point. In his proclamation of September 5, 1939, President Roosevelt, acting under the act of May 1, 1937, applied the arms embargo to France, Germany, Poland, the United Kingdom, India, Australia, and New Zealand, powers which were at war by virtue of unequivocal declarations of belligerency. South Africa and Canada, whose status was not exactly clear on September 5, were included by proclamations on September 8th and September 10th, respectively.

States engaged in the application of economic sanctions are not necessarily at war with the nation against which the measures are directed. Members of the League of Nations were not at war with Italy during the sanctions episode of 1935-36, even though they held the latter "had resorted to war" against Ethiopia. Sanctionist powers, therefore,

adopt the status of partiality and are neither neutral nor belligerent. It is up to the President to decide whether nations applying sanctions are "involved" or not. Executive discretion determines the matter. Since the enactment of the first neutrality law in 1935, the President has seen fit to interpret "involve" as meaning participation by a state as a full-fledged belligerent.

RÉSUMÉ

Adoption of special neutrality legislation by the United States has brought new problems. Issues arising under these domestic statutes must be clearly differentiated from those arising under general international law. New regulations concerning submarines, armed merchantmen and the treatment of Latin-American republics now supplement or contradict the customary international rules of neutrality. In regulating the entry of submarines and armed merchant vessels, in applying embargoes on loans and arms, and in making stipulations concerning trade and travel, the United States is clearly within its legal rights and is merely exercising its authority as conceded by the law of nations. The section relating to Latin America, however, calls under certain circumstances, for a position of partiality on the part of the United States which as a result may be called to account internationally for its unneutral conduct.

SOLUTION

(a) The submarine should be admitted. Whether, after entry it should be interned or allowed to make repairs and depart depends upon

whether all submarines are to be classed as warships or whether the American Government continues to recognize that some submarines can possess a genuinely commercial character.

(b) The action of the submarine of State U is illegal, constitutes a violation of American neutrality and should be protested by the United States. Despite its unneutral conduct in regard to Latin America, the United States is still a neutral and entitled to neutral rights, though its position is somewhat weakened by the application of section 8 of the law of 1937.

(c) The application of the provisions of the law of 1937 to states applying economic sanctions is a matter of executive discretion and not one of legal obligation.